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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 694

WARREN W. PERRY,

Petitioner,

vs.

COMMERCE LOAN COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF PETITIONER

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BRIEF OF PETITIONER

Opinions Below

The opinion of the Court of Appeals is reported in 340 F.2d 588. The memorandum opinion and order of the District Court is not reported.

Jurisdiction

The judgment of the United States Court of Appeals for the Sixth Circuit sought to be reviewed was dated and entered on January 25, 1965 (R. 21-22). The Petition for a

Writ of Certiorari was filed on April 24, 1965, and was granted October 25, 1965 (R. 23).

Jurisdiction to review said judgment by Writ of Certiorari is believed to be conferred on the Supreme Court by the provisions of Title 28, U.S. Code, Section 1254 (1).

Question Presented

The question presented is whether a discharge in bankruptcy received within six years prior to the filing of a proceeding for relief under Chapter XIII of the Bankruptcy Act, constitutes a bar to confirmation of a Wage Earner Plan, the sole purpose of which was to obtain for the wage earner an extension of time within which to pay his debts in full.

Statutes Involved

The relevant statutory provisions are as follows:

> Title 11. U.S.C.A. Sec. 1056(a) "The Court shall confirm the plan if satisfied that—(3) The Debtor has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to the discharge of the bankrupt;"
>
> Title 11. U.S.C.A. Sec. 32(c) "The Court shall grant the discharge unless satisfied that the bankrupt has—(5) in a proceeding under this title commenced within six years prior to the date of the filing of the Petition in bankruptcy had been granted a discharge, or had a composition or an arrangement by way of composition or a wage earner plan by way of composition confirmed under this title;"

Title 11. U.S.C.A. Sec. 1060 "Upon compliance by the debtor with the provisions of the plan and upon completion of all payments to be made thereunder, the Court shall enter an order discharging the debtor from all his debts and liabilities provided for by the plan, but excluding such debts as are not dischargeable under Section 35 of this title held by creditors who have not accepted the plan."

Title 11. U.S.C.A. Sec. 1061 "If at the expiration of three years after the confirmation of a plan, the debtor has not completed his payments thereunder, the Court may nevertheless, upon the application of the debtor and after hearing upon notice, if satisfied that the failure of the debtor to complete his payments was due to circumstances for which he could not be justly held accountable, enter an order discharging the debtor from all his debts and liabilities provided for by the plan, but excluding such debts as are not dischargeable under Section 35 of this title held by creditors who have not accepted the plan."

Statement of Case

Petitioner, a resident of Kentucky, on August 8, 1963, filed a Wage Earner Plan under Chapter XIII of the Bankruptcy Act and filed an application for confirmation of his plan. The debtor listed total debts of $1412.00 plus Trustee's administration expenses and attorney fees estimated at $250.00. He proposed to pay $60.00 per month to the Trustee, and since his plan called for 100% payment of both secured and unsecured debts, the plan was one of extension whereby his debts would be paid in full and the plan would

have been completed within twenty-eight months after confirmation.

Upon examination of the debtor, when the case came on for hearing, on September 12, 1963, it was revealed that the debtor had filed a prior bankruptcy proceeding in the same Court on May 20, 1959, and had received a discharge on June 29, 1959. Commerce Loan Company, one of the creditors, listed in the Chapter XIII petition, objected to confirmation of the Plan because the debtor had received a discharge in a bankruptcy proceedings filed within six years next preceding the filing of the Chapter XIII petition. The Referee denied debtor's application for confirmation of his plan and sustained the motion to dismiss the petition. Petition for review was filed by the debtor and the District Court dismissed the petition for review and affirmed the Referee's order denying confirmation of the debtor's wage earner plan (R. 15). Upon appeal to the Court of Appeals for the Sixth Circuit, the dismissal was affirmed, the Court holding that the discharge within six years operated as a bar to confirmation of the plan and that the fact that the Wage Earner Plan was one seeking an extension of time to pay the indebtedness instead of another bankruptcy case, was immaterial. The Court recognized the conflicting decisions of the several Circuits but followed the decisions of *In the Matter of Schlageter,* 319 F.2d 821 (C.A. 3, 1963) and *In re Jensen,* 200 F.2d 58 (C.A. 7, 1952) and rejected the reasoning of *Edins* v. *Helzberg's Diamond Shops, Inc.,* 315 F.2d 223 (C.A. 10, 1963) and *In re Verlin,* 148 F. Supp. 660 (E.D.N.Y. 1957), aff'd 225 F.2d 682 (C.A. 2, 1958) (R. 19-22).

It is the contention of petitioner that when Section 14c(5) of Chapter III of the Bankruptcy Act, 11 U.S.C.A. Section

32(c) (same) was enacted by Congress, it was not intended that a prior discharge in bankruptcy within six years of the filing of a Wage Earner extension plan would bar confirmation of such plan. Since the so-called "guilt" statute, referred to above, mentions a discharge in bankruptcy, a composition, or an arrangement by way of composition, or a Wage Earner Plan by way of composition, and omits mention of a plan by way of extension, it becomes material that the present plan contemplates payment in full to both secured and unsecured creditors and this is by way of extension only, and not composition.

Argument

It is laudable and understandable that the Bankruptcy Act wisely bars a bankrupt from a discharge if he has within six years previously received a prior discharge in bankruptcy, the purpose being to prevent "the creation of a class of habitual bankrupts, . . . (i.e.), debtors going through bankruptcy and escaping payment of their debts whenever and as frequently as they chose." *In Re Thompson,* 51 F. Supp. 12, 13 (W.D. Va. 1943), quoted by Judge Clarke in his opinion in *In Re Mahaley,* 187 F. Supp. 229 (S.D. Cal. 1960), and by Judge Oliver in his opinion in *In Re Sharp,* 205 F. Supp. 786 (W.D. Mo. 1962).

The problem now presented is what recourse is there to one who has had to resort to bankruptcy, and who, within six years has again found himself in financial difficulty? He is faced with the threat of garnishment and attachment of his weekly pay check. His employment is threatened, and his job will be terminated and his earning capacity ended, unless he obtains relief from such attachment. To

be sure, he must take a portion of the blame for his improvidence but this unfortunate economic dilemma, multiplied thousands of times throughout the country, is encouraged by modern sales pressures and installment buying preying on man's natural desire to enjoy all the abundance of goods that are made available by this great industrial nation. In order to relieve his plight and to keep this man as an active and productive member of society rather than have him forced upon the charity rolls, some relief, other than straight bankruptcy, must be available.

The question now before the Court is whether the problem presented by this cause was anticipated and specifically provided for by the enactment of Chapter XIII of the Bankruptcy Act, entitled Wage Earner's Plans (U.S. C.A. Title 11, Secs. 1001-1086) and adopted in 1938 as part of the Chandler Act. These Wage Earner proceedings, as an alternative to bankruptcy, have been successful and popular in certain districts. For example, in Cincinnati, Ohio, the recent statistics reveal that over a period of approximately four years, about 2800 wage earner plans have been filed at the Cincinnati office in the U.S. District Court for the Southern District of Ohio. In a recent report made public by William R. Schumacher, Trustee, it is revealed that over said period his office has paid out $2,000,000.00 to creditors; that in the fiscal year ending July, 1965, $963,000.00 was paid to creditors and that at the present time disbursements average $100,000.00 per month. This figure indicates the economic benefit to society derived through Chapter XIII proceedings. It is significant that when Chapter XIII cases are successfully concluded, the creditors are paid almost 100%, while statistics show that approximately 85% of all straight bankruptcies are

either no asset or nominal asset cases from which no dividend is available to creditors.

Although it must be borne in mind that petitioners under Chapter XIII are not seeking to avoid their debts, but are seeking the assistance of the Court in an effort to pay their debts, and that this is praiseworthy from a social or philosophical approach, yet a Referee in Bankruptcy is bound by the limits of the Bankruptcy Act.

The chief limitation upon approval of a confirmation of a plan in a Chapter XIII proceeding is found in Title 11, U.S.C.A. Sec. 1056 (3):

> "The Court shall confirm a plan if satisfied that . . . (3) the debtor has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to the discharge of the bankrupt."

Section 14c of the Bankruptcy Act, Title 11, U.S.C.A. Section 32 states the grounds upon which a discharge in bankruptcy shall be denied and subsection 5 reads as follows:

> "The Court shall grant the discharge unless satisfied that the bankrupt has . . . (5) in a proceeding under the Act commenced within six years prior to the date of the filing of the petition in bankruptcy had been granted a discharge, or had a composition or an arrangement by way of composition or a wage earner's plan by way of composition confirmed under this Act."

It should be noted that the reference to a wage earner's plan in subsection 5 refers only to a composition, or

arrangement by way of composition as opposed to an extension. It logically follows that the omission of the mention of a plan by way of extension implies that Congress meant to exclude such a proceeding. The Court in *Edins* v. *Helzberg's Diamond Shops, Inc.*, 315 F.2d 223 (C.A. 10, 1963) determined that the provisions of Section 32 (c)(5) can, under a literal reading thereof, apply only to a petition in straight bankruptcy or to an arrangement or composition; that a Wage Earner Plan by way of extension is a special proceeding and is specifically omitted by the section.

The Second Circuit in deciding *Fishman* v. *Verlin*, 255 F.2d 682 (C.A. 2, 1958), also held that an extension agreement does not fall within the statutory bar.

Another case decided by the Tenth Circuit, *In Re Holmes*, 309 Fed. 2d 748 (C.A. 10, 1962) emphasized the decisively significant distinction drawn by Congress between compositions and extensions, and held that the statutory bar of discharge was not intended to apply to wage earners seeking extension of time to pay their debts in full and the fact that the wage earner had availed himself of a like plan within the preceding six years would not justify dismissal of the proceeding.

A discharge is obtainable under Chapter XIII in one of two ways: (1) by Section 1060 of Title 11, U.S.C.A. upon completion of all payments under a plan and compliance with its provisions; (2) by Section 1061 of Title 11, U.S. C.A., at the expiration of three years after confirmation notwithstanding the debtor's failure to complete his payments thereunder if the Court is satisfied that the failure was due to circumstances for which the debtor could not be

justly held accountable. Reading these two sections in conjunction with Sections 1056(a)(3) and 32(c)(5) *supra,* it appears that so far as its express words are concerned, Congress evidenced only a purpose to exclude confirmed extensions from the list of bars to subsequent relief dispensed by the bankruptcy Court. In fact, it would seem that any discharge after less than full payment would come fully within the dominant purpose underlying Section 32(c)(5).

In the case of *In Re Schlageter,* 319 Fed. 2d 821 (C.A. 3, 1963), a strict interpretation of the Act in question was applied and confirmation of the plan was denied. The Court reasoned that a Wage Earner Plan could not be characterized as a simple extension because by operation of statute, the debtor may be discharged at the end of three years if his failure to pay all his debts is due to circumstances beyond his control. At first blush, this appears to be a good point, but an answer to this contention is that if such a situation occurred (and this is a rare occasion), the creditor who did not receive payment in full could, at that time, make proper opposition on the grounds that relief was tantamount to a second discharge in bankruptcy within six years.

Petitioner submits that the phrase "a plan shall not be confirmed if the debtor has been guilty of any of the acts or failed to perform any of the duties which would bar a discharge in bankruptcy" as employed in Section 1056(3) *supra,* should not be construed as a careless or casual selection of words. Reference to Section 32(c) *supra,* discloses that with the single exception of subparagraph 5, all of the subsections indicate wrongful acts. Webster's New International Dictionary defines guilt as "offense; sin; fault." It is incomprehensible that the term "guilt"

could be applied to a legal proceeding maintained in an established court of law where the relief sought is not a discharge of indebtedness, but only an orderly method of the amortization of indebtedness. The exclusion of the phrase "wage earner plan by way of extension" from Section 32(c)(5) indicates that Congress did not intend that a prior discharge in bankruptcy would be a bar to such relief.

Conclusion

Petitioner submits that the present proceeding is not based upon a petition in bankruptcy; neither is it a composition nor an arrangement by way of composition nor a wage earner plan by way of composition. It is a special proceeding whereby the debtor seeks an extension of time to pay all of his debts in full. The provisions of Section 32(c)(5) *supra,* apply only to those proceedings specifically referred to therein and not to a wage earner plan by way of extension. This interpretation is not only legally consistent with the Bankruptcy Act but also agrees with the better philosophical and sociological solution to the problem.

Because the United States Court of Appeals has erroneously interpreted the Statutes involved in this cause, its decision should be reversed.

Respectfully submitted,

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